Office Supreme Court, U.S.
APR 27 1955
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 693.

SOPHIE D. COHEN and MEYER KRAUSHAAR, Executors of the Estate of William W. Cohen, Deceased,

Petitioners,

against

BESSIE G. GLASS, Executrix of the Estate of Joseph Glass, Deceased, Joseph P. Tumulty, Jr., Executor of the Estate of Joseph P. Tumulty, Deceased, and Middle States Petroleum Corporation,

Respondents.

JOINT BRIEF OF RESPONDENTS, BESSIE G. GLASS, EXECUTRIX OF THE ESTATE OF JOSEPH GLASS, AND JOSEPH P. TUMULTY, Jr., EXECUTOR OF THE ESTATE OF JOSEPH P. TUMULTY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LESLIE KIRSCH and JOSEPH P. TUMULTY, JR.,
Counsel for the Respondents, Bessie G. Glass, Executrix of the Estate of Joseph Glass, and Joseph P. Tumulty, Jr., Executor of the Estate of Joseph P. Tumulty.

Dated, April 25, 1955.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

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Introductory Notes

Corporate titles will be abbreviated as in the majority opinion of Judge Learned Hand (pa 2020).

References to the Record are to the given pages of the parties' appendices in the Court of Appeals or in this Court, distinguished as indicated below.

The reference "114a" and all similar references are to the given pages of appellants' appendix (grey cover) in the Court of Appeals, the page numbers of which are followed by "a".

The reference "ja 114" and all similar references are to the given pages of appellees' joint appendix (blue cover) in the Court of Appeals, intended to be described by the letters "ja".

The reference "pa 2017" and all similar references are to the given pages of the appendix to the petition for certiorari in this Court, intended to be described by the letters "pa".

The reference "ra 45" and all similar references are to the given pages of the appendix to this joint brief of respondents in this Court, intended to be described by the letters "ra".

The reference "ff. 1, p. 730" and all similar references are to the numbered findings of fact at the given page of the report of *Phelan* v. *Middle States Oil Corporation,* 124 F. Supp. 728.

The references "r. ex. 3, ja 1233", and "ob. ex. 203, 1778a", and all similar references, are to receivers' or objectants' exhibits in evidence, printed at the given pages of the designated appendix. The reference a. s. o. and all similar references are to the amended and supplemental objections.

Italics in all quotations are ours, unless otherwise indicated.

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Respondents controvert petitioners' statement of the case, including all the matter in their extracts from the dissent below, and necessarily assume the burden of correcting the major errors and omissions therein.

Concerning Jurisdiction as to Glass.

The first judgment of the District Court, dated January 4, 1952, was entered January 8, 1952 (13a). It was a judgment upon multiple claims pursuant to Rule 54 (b),

R. C. P. (9a). March 25, 1954, the Court of Appeals entered a judgment dismissing, as to Glass, petitioners' appeal therefrom (ra 45-6). Petitioners did not apply for a writ of certiorari to review that judgment of the Court of Appeals as to Glass.

The second judgment of the District Court was entered May 21, 1954 (ra 47). It left untouched the adjudications as to Glass in paragraphs 1, 2, 3, 6 and 7 of the first judgment of the District Court (9a-13a). June 8, 1954, petitioners and others appealed from the second judgment of the District Court as to Glass (ra 48-9). However, they did not, as to Glass, appeal from any part of the first judgment of the District Court. January 11, 1955, the Court of Appeals entered a judgment affirming the second judgment of the District Court (pa 2208).

It is respectfully submitted that there is no jurisdiction, as to Glass, in respect of paragraphs 1, 2, 3, 6 and 7 of the first judgment of the District Court upon petitioners' application to review the second judgment of the Court of Appeals. Any assumption to the contrary in the court below was an inadvertence. It did not come to light until respondents' counsel compared the first paragraph of the petition, where the enlarged scope of the certiorari requested is set forth, with the notice of appeal upon the second appeal to the Court of Appeals, which shows the limited scope of that appeal by petitioners and their then co-appellants (ra 48-9).

Concerning the Questions Presented by Petitioners.

Questions 1 through 4 purport to relate to both receivers, the testators of the instant respondents. Questions 5 through 7 relate only to a third respondent.

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Each of the first four questions is constructed out of presuppositions contrary to the findings of fact, or the evidentiary bases thereof, or the concessions below. As to Glass, each of the first four questions necessarily involves matter covered by paragraphs 1, 2, 3, 6 or 7 of the first judgment of the District Court, in respect of which there is no jurisdiction here. As to Tumulty, petitioners conceded in the District Court that he was not liable, and the Court of Appeals affirmed as to him unanimously.

The first question presupposes that the receivers "brought about" a judicial sale or sales and confirmation thereof. Neither receiver did so. It further presupposes that the receivers failed to disclose to the court and the parties some unidentified personal conflict of interest. Neither receiver had any personal conflict of interest in whatever transaction petitioners may have intended to put in question. The court was fully informed of the relationships of both of them in any matter that involved a possible personal conflict.

The second question is based on the presuppositions that a conflict between receivership estates arose from judicial sales allegedly brought about by the receivers without application for instructions to the court upon notice to the parties. In fact, the judicial sales were not brought about by either of the receivers, and they were the subject of instructions by the court after notice to the parties.

The third question merely invites review of the findings of fact that the prices were fair. Whether or not the receivers had the burden of proving that they were fair, they did so.

The fourth question is similarly based on a long series of presuppositions contrary to the facts. The receivers did not sponsor the plan, or underwrite it, or make any representations concerning it. The plan was found not to have

violated the Boyd rule in respect of the U. O. P. bonds, the only securities involved here. Neither of the receivers brought about the judicial sales, which took place on notice to all parties. It was specifically found that petitioners' decedent, Cohen, had had actual notice of the sales and of the hearings on confirmation thereof.

Respondents' Statement of the Case.

1. Preliminary.

Petitioners' statement ignores the majority opinion of Judge Learned Hand and the findings of fact made by the District Court after a 74 day conspiracy trial upon a record consisting of 8,769 pages of testimony and 1,038 exhibits. It relies largely upon two extracts from the lengthy dissenting opinion which is pervaded with misapprehensions of the findings of fact and of their evidentiary bases. Such misapprehensions will be demonstrated below, if and where material.

Petitioners' statement assumes that paragraphs 1, 2, 3, 6 and 7 of the first judgment of the District Court, from which they might have, but did not, appeal upon their second appeal in the Court of Appeals, were not *res judicata* as to Glass on their second appeal, and that this Court has certiorari jurisdiction in respect of those paragraphs. Respondents' statement of the case must necessarily proceed upon the same assumption to cover that ground. However, in doing so, the jurisdictional point to the contrary in respect of Glass is not waived.

2. Petitioners' Bond Position.

The accounting of the receivers of United Oil Producers Corporation (U. O. P.) was approved and consented to in respect of $2,382,600 or more than 98½% of all the U. O. P.

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bonds (ff. 249, pp. 769-70). Of the $45,300 face amount held by others and upon which the distributive values were paid, $32,200 face amount were held by Cohen, petitioners' decedent. In 1935, Cohen collected the cash distributive values upon those bonds, $24,700 of which he had misappropriated from one of the receivership companies shortly before receivership in the chaos and absence of record which then existed (ff. 69-72, 260-72, pp. 735, 775). There remains $6,000 face amount of bearer bonds which have not been presented for payment during the last 25 years. They probably comprise that small residue of lost or destroyed bonds of unknown persons, which will never be presented for payment. No U. O. P. bondholder other than petitioners has objected. Petitioners' bond position is small and dubious.

3. Equity Receiverships; Judge Knox.

In 1924, thirty-nine interrelated corporations, most of them engaged in the oil business, went into equity receivership under the jurisdiction of Judge Knox in the United States District Court for the Southern District of New York (introduction to the findings and ff. 1-6, pp. 729-31). These receiverships were begun upon creditors' bills which followed a stockholders' suit against Middle States Oil Corporation (M. S. O.), called the Shivers action.

The Shivers action was brought by the firm of Olcott, Olcott & Glass, who represented Shivers and the committee formed by Shivers to represent M. S. O. stockholders. Glass was a junior working partner in the Olcott firm, with only a small interest in it (ff. 8, p. 731; 186a; ja 1181). The receivers appointed were Joseph P. Tumulty and Julius M. Mayer, formerly a judge of the Circuit Court of Appeals for the Second Circuit (ja 13-14, 42-3). With knowledge that the Olcott firm had been attorneys for Shivers and his

M. S. O. stockholders committee in the Shivers action in which Glass appeared before him as counsel, Judge Knox appointed the Olcott firm as co-attorneys for said receivers of all the companies (124 F. Supp. 728, 778). With knowledge of those facts, Judge Knox later appointed Glass successor receiver to Mayer when the latter died (ff. 8-9, p. 731; cf. ja 2153).

4. The Haskell Books.

The accounting situation was one of chaos (ff. 10-11, p. 731). The books and records of all the companies, which had been despoiled by Haskell, had either been destroyed, falsified or confused by him (114a, 142a; r. ex. 51, ja 1418-19, in ev. ja 38). It was necessary to construct new books for 55 corporations covering an aggregate period of *204 work years* (r. ex. 58A, ja 1436-40, in ev. ja 46).

During the years 1924-1929, Judge Knox made orders authorizing the retention and payment of a corps of appraisers, tax attorneys, valuation engineers and accountants (abstract of 47 references thereto in court papers, r. ex. 18, ja 1252-73, in ev. ja 10). Judge Knox who signed these orders knew that the court files were full of references to this corps of experts, and that no one seeking information from the court files could fail to learn of their retention and payment and the existence of their reports.

The committees requested information from the receivers and it was freely supplied to them. It was not refused to any one else.

5. Receivers' Reports; Inventory; Valuations.

Three receivers' reports were filed and sent to the approximately 60,000 creditors and stockholders of all the receivership companies (r. exs. 22, 34, 51, ja 1279-1326, 1342-88, 1394-1432, 38).

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In April 1928, the inventory of all the physical properties in all jurisdictions was completed. It comprises four volumes of 1,613 pages (r. exs. 48A-D, in ev. ja 36; not printed in the appendices). In July 1928, the valuations of all the properties of all the companies were completed by Ligon, the petroleum engineer appointed by the Court for that purpose (ja 41). They are three volumes of 1,349 pages (r. exs. 54 A-C, in ev. ja 42-3; not printed in the appendices).

These seven enormous volumes running to 2,962 pages were not placed in the court files (ja 36-9, 42-3). Judge Mayer, Glass' predecessor receiver, recently come down from the Circuit Court of Appeals, had not placed any of the earlier appraisals there (ja 13-14, 42-3, 1305-8). Glass, as did Mayer, referred to these volumes in the receivers' reports which were mailed to all the creditors and stockholders, and made the volumes available to all persons requesting the information (ja 1305-8, 607-8). In the 1920's there was no rule requiring that such papers be filed with the court clerk (ja 43).

Between October 1928 and April 1929, tentative valuation balance sheets for the thirty-nine receivership companies, based on the Ligon valuations, were laboriously completed and circulated among the committees. No one having an interest in the inventory or the valuations could have failed to ascertain their existence and procure them for the asking (ff. 29-30, p. 732). May 11, 1929, the book of tentative valuation balance sheets was handed up to Judge Knox *in open court*, together with the book of income statements for the year 1928 (r. exs. 75-6, ja 1459-1520; ja 1273; r. ex. 67A, 1321a-26a, in ev. ja 49-50). The dissenting opinion holds that they were not "filed"; the majority that the "complaint that all the papers were not filed in the clerk's office is too trivial to require an answer" (pa

2050). The dissenting opinion states that the nine volumes of intercompany accounts were never filed, but "removed . . . to the receivers' offices" (pa 2106-7). They bear the stamp "Filed December 9, 1929", and lay in the court clerk's file down the years since that date until they were placed in evidence at the trial (ja 100-1). They were before the Court of Appeals as original exhibits.

6. Judge Knox's Mandate for Reorganization.

The fees and expenses of the valuation engineers, accountants and tax experts were large. In March 1928, Judge Knox stated ". . . the cost is staggering"; in June 1928, he stated ". . . the cost of this receivership has been such as to give me grave concern . . ."; in November 1928, he again expressed his concern (r. ex. 46A, not printed in the appendices; r. ex. 47, ja 36, also not printed; ja 46). March 3, 1929, in a letter to the receivers and the committees, Judge Knox reiterated his "grave concern"; sharply summoned them to a reorganization hearing, and stated ". . . I am anxious that the responsibility of the court cease at the earliest practicable moment" (ff. 27, 34, pp. 732-3, r. ex. 60, ja 1442-6).

7. The Reorganization Hearings.

The transcripts of these hearings comprise 129 printed pages (1290a-1419a). At the first hearing on March 9, 1929, Judge Knox spurred every one to reorganization. ". . . I want action at the earliest possible date" (1314a). The tentative valuation balance sheets were in process of completion. The committees asked for time until they were completed (1309a, 1318a). Concerning the interest on the U. O. P. bonds, Judge Knox stated ". . . that is a thing that is giving me a good deal of concern in realizing how this 8% interest is accumulating. It puts those bondholders

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in a better position and it puts them in a position where they can say 'Stand and deliver'" (1315a; cf. Judge Knox's statement in his letter, r. ex. 60, ja 1444). Judge Knox allowed 60 days to report back (1320a; ff. 27, 34, pp. 732-3).

At the second reorganization hearing held May 11, 1929, the tentative valuation balance sheets and the operating statements were filed in open court (1322a-6a; r. exs. 76-6, ja 1459-1520; cf. Rule 5 (e), R. C. P.). Judge Knox warned: ". . . if it ever gets down to a question of legal rights, you will simply scatter this whole thing over the landscape and there will be nothing for anybody . . . The creditors *and stockholders* have got to get something out of this, if *I* can see to it *in any way, shape or form* . . ." (1338a; cf. 124 F. Supp. 728, 782 as to the concept of "relative priority" in 1929). This time Judge Knox allowed 30 days to report back.

At the third reorganization hearing held June 15, 1929, Judge Knox suggested that the attorney for the corporations should be permitted to become a member of the reorganization committee. He proposed meeting again in two weeks and stated "I would be glad to get it through and out of court before the fall" (1349a). Committee counsel stated that it was not possible. This time Judge Knox gave the committees 25 days to report back.

At the fourth reorganization hearing held July 9, 1929, the attorney for the corporations, added to the reorganization committee at Judge Knox's suggestion, objected to the reorganization plan (1361a-3a). The fifth reorganization hearing was held in chambers on July 15, 1929. Judge Knox heard the objections to the plan by the committee for the U. O. P. bondholders and compromised them by suggesting that the new bonds bear 6½% interest rather than the 7% they demanded and the 6% offered by the other interests

(ja 79-80; r. ex. 90, ja 1556-8; r. ex. 89, not printed in the appendices). The objections of the attorneys for the corporations were overruled. All differences having been eliminated, the reorganization plan was put in final form and, on July 30, 1929, sent to Judge Knox and promulgated (r. exs. 93A-C, ja 1563-5). Petitioners conceded that Judge Knox was informed about the reorganization plan "time and again" (ja 107). The hearings toward the end of 1929 are summarized below.

8. Receivers Neither Authors Nor Sponsors of the Plan.

The receivers were neither the authors nor the sponsors nor the "underwriter" of the reorganization plan. The successive draft bases of the plan were prepared by the attorneys representing the different and conflicting security interests. Mr. Lehman, petitioners' witness, testified that he and other committee counsel prepared the plan (ja 386). The receivers repeatedly disclaimed being the authors or the sponsors of the plan (ob. ex. LLL, ja 2158, in ev. ja 237-8; r. ex. 125D, not printed in the appendices, in ev. ja 103-4). The letter, signed by *both* receivers, prefixed to the plan, is misconstrued in the dissenting opinion. It was addressed to Mr. Sague, chairman of the reorganization committee, and stated "* * * While *we* are not in a position to, and do not intend to, bind *the Court* by our expressions, we are happy to say that in *our personal* opinion *your* Plan of Reorganization does accomplish substantial justice to all of the interests involved * * *" (r. ex. 94, ja 1566-7, in ev. ja 82). The plan expressly negated any warranty or representation by the receivers (ja 1587-8).

9. Potential Purchasers; the Stock Market Crash.

Three potential purchasers evinced interest. Information, including the Ligon valuation reports, was made

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available by the receivers to Transcontinental Oil Company, Lion Oil Refining Company, and a representative of a Canadian oil company (ja 43-4, 71-2, 88; 1310a; r. exs. 55, 83A, at ja 1433, 1537). October 24 and 29, 1929, the great stock market crash occurred, and the prices of stocks and bonds fell heavily (ja 84-7). The December 1929 sales herein were of stocks, bonds, and intercompany claims "whose purchaser", Judge Learned Hand stated, "would have merely bought into an incredibly complicated nest of law suits" (pa 2051; ff. 10-19, 53-58, 93-131, pp. 731-2, 734, 757-60).

10. U. O. P.'s Inability to Pay Interest; Relative Misapprehensions in the Dissent.

Judge Knox and everyone in the case knew that U. O. P., the debtor on $2,433,900 of bonds, and Imperial Oil Corporation (Imperial), the guarantor of said bonds, had not a single dollar of cash or other current assets (ff. 40, 217-220, pp. 733, 767; ja 201, 1385, 1429, 1471, where omission of the name of United and Imperial indicates no bank balance, ja 1496, 1518; r. ex. 201, the most important exhibit in the case, being the 1929 valuation balance sheets of the 39 corporations, not submitted by petitioners to this Court with the printed appendices). Eureka Producing Company (Eureka), whose stock U. O. P. had pledged as security for the bonds, had current assets of $132,255.62, with which to meet current liabilities of $311,637.91 (ja 197-8; r. ex. 201). Turman Oil Company (Turman), only 82% of whose stock was owned by Eureka, had current assets of $1,622,127 and current liabilities of $440,924.97, or total net current assets of $1,181,202.03 (r. ex. 201).

U. O. P.'s *gross* income for the year 1929 was $86.80; Imperial's zero; Eureka's $4,149.56; Turman's $311,973.24 (ja 2150-52; ob. ex. J, another important exhibit not

submitted by petitioners to this Court with the printed appendices). Moreover, no cash could ever reach the receivers, via dividends by Turman and Eureka, with which to pay interest on the U. O. P. bonds. The Eureka stock was not only held by, but was registered in the name of, the U. O. P. indenture trustee who would have received the dividends and who alone could have paid interest on the U. O. P. bonds (ja 34-6). It was empowered to sell the Eureka stock at any time to satisfy any defaults of principal or interest on the U. O. P. bonds, and its right to do so was not restricted or enjoined (U. O. P. trust indenture, r. ex. 39, p. 19; order, r. ex. 45, pp. 4-5; neither of which is printed in the appendices).

Reference is made to the misapprehensions in the dissenting opinion, that U. O. P. could have paid part, if not all, of the interest on its bonds during the receivership; that the District Court made no finding of fact to the contrary; and that "Significantly, my colleagues do not discuss this question" (pa 2082-3). Those misapprehensions are based on the second paragraph of finding of fact 40, which is quoted in the dissent (ff. 40, p. 733). The dissenting judge overlooked findings of fact 218-220, p. 767, which are the very findings of fact he thought had not been made.

11. The U. O. P. Sales; Relative Misapprehensions in the Dissent.

In October 1929, the U. O. P. bondholders committee directed the U. O. P. indenture trustee to foreclose the Eureka stock, to enforce the guarantee against Imperial, "and to take any and all steps necessary or appropriate to protect the interests of the holders of said bonds" (ja 82-3). October 28, 1929, after the first great stock market crash,

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and after five years of receivership which he had stated he was intent on getting out of court, Judge Knox granted leave to the U. O. P. indenture trustee to foreclose the trust indenture under which it held the Eureka stock (order to show cause and order thereon, r. exs. 99 A-B, not printed in the appendices). Judge Knox did not consult the receivers in making that order. Petitioners' own witness testified on deposition that to his personal knowledge the foreclosure sale was not brought about by the receiver Glass (ob. ex. 135, p. 123, in ev. ja 849-50, not printed in appendices). The statements to the contrary in the dissenting opinion and in the first four "questions presented" by petitioners are misapprehensions.

Judge Knox himself suggested changes in the final decree of sale in the U. O. P. foreclosure action (ja 89; ja 360). November 15, 1929, without consulting the receivers, Judge Knox signed the final decree after it had been revised in accordance with his own suggestions (ja 92). The final decree and the notice of sale therein contained, which was not prepared by the receivers or their attorney, reflected Judge Knox's considered judicial acts, including approval of the notice of sale, appointment of a special master to publish the notice of sale, to sell the Eureka stock, and to publish notice of availability of payment of the proceeds of the sale (r. ex. 103, ja 1600-28).

The unpledged or free assets of U. O. P. consisted of three intercompany accounts receivable (accounting r. ex. 3, ja 1238). Their face amounts had no relation to "value" (ff. 217, p. 767). The receivers petitioned Judge Knox for *instructions* concerning the disposition of them (r. ex. 114, ja 1650-9). Judge Knox ordered them sold at public sale by the same special master (r. ex. 115, ja 1659-97).

Article sixth of his decree required the receivers to file a *general statement* of the assets to be sold (ja 1676-7).

They filed such a statement and sent a copy of it to Judge Knox (r. exs. 121-2, ja 1699-1720, in ev. ja 97-9). Judge Knox who, in December 1929, had knowledge of the facts therein reflected, did not then see any of the deficiencies read into it twenty-five years later by the dissenting judge. The statement was not intended to be the equivalent of valuation data or balance sheets (ja 99, 261-2; cf. Civil Rule 27, USDC, SDNY). Moreover, it contained *four* invitations to come to the receivers' offices for further information (ja 1708, 1712, 1715, 1720). They were not required by Judge Knox's decree of sale (ja 98-9).

The dissent states that the amount of the account receivable by U. O. P. from M. S. O. was "left in utter obscurity" (pa 2106). The amount was obviously known when it was placed in the statement on December 6, 1929. It never varied thereafter. It was thereafter confirmed by Judge Knox in his first, and reconfirmed in his second, approval of the intercompany accounts as reconstructed by the receivers' staff out of the Haskell chaos and absence of record (ff. 91, p. 739 at p. 742; ff. 92, p. 745 at p. 748). The dissent states that the statement failed to reveal "that substantial [tax] refunds would be made" (pa 2105). The statement showed to the last dollar the existence and the amounts of the "Claims against United States Government for refunds . . ." by M. S. O. (ja 1703-4). There were no claims for refund by U. O. P. (ja 1712-15). When the statement was filed, the M. S. O. claims for refund were still pending undetermined before the "Joint Committee on Taxation of the House and Senate" after five years of tax controversies involving $15,000,000 of tax claims by the United States against the companies. Judge Knox was kept constantly informed of the situation by the receivers, and must have been aware of the elements of unpredictability as to the date when the refunds might be made (r. ex. 140 A-E, ja 1781-90; 1293a-95a, 1297a-98a, 1323a, 1336a, 1379a).

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12. The Sales; the Confirmations; the Indenture Trustee; Relative Misapprehensions in the Dissent.

During the weeks of November 16-December 14, 1929, multiple publications of notice of the foreclosure and judicial sales of the pledged and unpledged assets of U. O. P., and of the hearings on confirmation thereof, were made by the special master in ten leading newspapers throughout the country (ja 89-97; ff. 40, p. 733). Petitioners' decedent, his brokerage firm, and his wife individually, were among those who received notice by mail of the sales and of the hearings on confirmation thereof (ff. 268, p. 775). The sales were held on December 16, 1929, shortly after the great stock market crash of October, 1929 (ja 84-5). The amounts bid at the sales were *not* fixed, or "agreed to", by the receivers (ff. 41-6, pp. 733-4; ja 382-6).

The indenture trustee *representing all U. O. P. bondholders,* including petitioners' decedent, attended the sales and carefully considered, upon a written memorandum and in oral discussions, the fairness of the amounts bid, especially in relation to possible dissenters (ja 350-9; 510a; r. ex. 219, ja 1924, in ev. ja 354-7; ob. ex. 125, not printed in appendices). The U. O. P. indenture trustee itself petitioned for and procured confirmation of the sale (ja 1733-5). The dissent states that in doing so the indenture trustee ". . . relied upon Glass's views . . . tainted by his self-interest" (pa 2093-4). Glass did not confer with the indenture trustee or any of its officers or counsel in relation to the foreclosure or sales in 1929 (ja 800-1). There was no taint and there was no reliance.

The bidders for the reorganization committee also petitioned Judge Knox for confirmation and annexed to their petition a copy of the reorganization plan so that he might take *judicial cognizance* of the fact that confirmation would be a step toward consummation of the plan (ja 1736-42).

The hearing on confirmation was held December 20, 1929 (1366a-9a). There was a vigorous and documented written protest against confirmation as a step toward consummation of the plan, and Judge Knox was careful to note it on the record (1369a, where the Court's reference is to ob. ex. LLL, ja 2158-80, in ev. ja 237-8). The quotation in footnote 32 of the dissent (pa 2091) stops short of the statement by Judge Knox in which he noted that objection. The true sense of Judge Knox's reference to the protest is shown by the following facts: Judge Knox was requested to take cognizance of the plan at the hearing on confirmation; Judge Knox did so and, upon signing one of the decrees of confirmation, physically annexed thereto the protest against confirmation which is ob. ex. LLL printed at ja 2158-80; Judge Knox expressed his approval of the plan in a filed opinion (r. ex. 157a, ja 1799-1800). Judge Knox did not order a formal hearing on the plan on notice although, *before* confirmation, the assistant to the receivers suggested doing so in open court (1415a). It would be extraordinary indeed to surcharge the receivers because Judge Knox took judicial cognizance of the plan on confirmation after published notice of hearing on confirmation, rather than at another hearing upon another notice.

Judge Knox had a special competence and knowledge in respect of the subject matter before him for confirmation. Judge Knox: "Well, I happen to know something about this business of oil production because I was born and raised in the oil field" (ob. ex. 197, not printed in the appendices). Petitioners' attorney conceded below: "Judge, I will concede that Judge Knox grew up in the oil business and knew all about the oil business . . ." (ja 71). December 24, 1929, without consulting the receivers, Judge Knox signed the orders confirming the sales (ja

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107-8). Those orders are not here as upon an appeal therefrom. The matter in issue is an accounting which shows merely the receivers' obedience to those orders (r. ex. 3, ja 1233-43).

Summary of Argument.

The extent of jurisdiction invoked as to Glass on pages 1-2 of the petition does not exist.

By petitioners' concession there is no case as to the receiver Tumulty.

Petitioners are merely seeking another trial *de novo* in this Court upon questions of fact concerning alleged values and alleged frauds which have been adjudicated twice or thrice in the last twenty-five years by three different courts.

There is no Boyd rule question as to U. O. P. or its receivers.

The dissent is based on misapprehensions of the findings of fact and of their evidentiary bases.

The judgment of the Court below is correct, and no sufficient reason has been advanced for its review by this Court.

POINT I.

The extent of jurisdiction invoked by petitioners does not exist as to Glass.

The pertinent facts are set forth at pages 1-2 above.

Petitioners might have, after the modification of the District Court's first judgment in relation to Glass, appealed from the first judgment as modified by the second, as well as from the second which effected the modification. Instead, they appealed only from the second judgment to the extent

that it modified the first (ra 48-9). It results that paragraphs 1, 2, 3, 6 and 7 of the District Court's first judgment in relation to Glass, which were *not* modified by its second judgment, were *not*, after the dismissal of petitioners' appeal from the District Court's first judgment, ever again appealed from by petitioners. There is no judgment here of the Court of Appeals from which petitioners have made a timely application for a writ of certiorari in so far as paragraphs 1, 2, 3, 6 and 7 of the District Court's first judgment in relation to Glass are concerned. The second judgment of the Court of Appeals—the only judgment upon which petitioners seek certiorari—affirms *only* the second judgment of the District Court (pa 2208). As to paragraphs 1, 2, 3, 6 and 7 of the District Court's first judgment, which in relation to Glass as a receiver of U. O. P. covers everything except his formal discharge, there is no jurisdiction. *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Company,* 344 U. S. 206, 97 L. ed. 245 and the L. ed. annotation thereto wherein the authorities are collated; *Dickinson* v. *Petroleum Conversion Corporation,* 338 U. S. 507, 94 L. ed. 299.

POINT II.

Petitioners conceded below as to the receiver Tumulty. There is no question here concerning him.

In the division of the receivers' responsibilities, Tumulty concerned himself primarily with the elimination of the $15,000,000 of tax assessments and the claims for refund before the Treasury Department in Washington, D. C., where he had his offices (ff. 20-3, p. 732, ff. 80, pp. 736, 807; pa 2060; ja 1781-8; 1404a-11a; ja 1806-7).

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On January 2, 1930, when the bills of sale of the U. O. P. assets were delivered, the receivership of U. O. P. was, except for formal discharge of Tumulty and Glass as receivers, completely terminated, as Judge Knox intended it should be, by the sale of all its assets. Since then U. O. P. has been absolutely defunct, without a dollar of assets, without any transactions, and each of its receivers *functus officio.*

At the end of the 74 day trial, Tumulty's attorney separately moved for discharge of Tumulty as a receiver of U. O. P. (124 F. Supp. 728, 807). Upon that motion he showed to the Court the undisputed fact that Tumulty was in no way affected by any of the charges of conflicting interests which petitioners had made solely against his co-receiver, and that petitioners had conceded that "he [Tumulty] should not be held accountable".

Thus, he showed that petitioners' amended objections concede (a. s. o., par. 60, p. 49, fol. 1829a):

> "That the Receiver Joseph P. Tumulty did not participate directly in the misconduct of the Receiver Joseph Glass and had no knowledge of the same and, since April, 1941, has been incapacitated and unable to participate in the said receivership and is unaware of the official acts of Joseph Glass since said time and has been unaware of the same for some time prior thereto, the exact time being unknown to these objectants and, therefore, *he should not be held accountable.*"

Petitioners' prayer for relief below excludes Tumulty. It reads: "Wherefore, your objectants ask that Joseph Glass and Middle States Petroleum Corporation be surcharged" etc. It is clear that petitioners conceded that Tumulty was not liable.

The decision of the Court of Appeals was unanimous as to Tumulty. Upon petitioners' concessions and the indisputable facts, there is no case here as to Tumulty.

POINT III.

The orders of confirmation made by Judge Knox twenty-five years ago are the first of three independent adjudications of the fairness of the sales prices. Petitioners' decedent is bound by actual notice and by the acts of the indenture trustee who represented him. The double option to non-depositors was fair. Relative misapprehensions in the dissent explained.

1. Fairness Found Twenty-five Years Ago.

The evidence of the knowledge, views, and acts of Judge Knox twenty-five years ago dominates the case. It is not limited to the matters referred to in our statement of the case above or in our points. We refer also to his knowledge, understanding, and judicial acts as evidenced by *every* petition he read, *every* matter he heard, *every* order he made, *every* communication he received, during his five years of administration of the receiverships. Deference is due to his intelligent comprehension of the matters which came before him. *Comstock* v. *Institutional Investors,* 335 U. S. 211, 230, 92 L. ed. 1911, 1924; *Warner Bros., etc.* v. *Lawton-Byrne-Bruner,* 79 F. 2d 804, 814-5.

Twenty-five years ago Judge Knox was not obliged to make specific findings as to values and the fairness of the prices bid and presented for confirmation. But the motions and petitions for confirmation, especially because of the protest against them which he noted on the record, required him to take *cognizance* of the plan to protect the rights of

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all. *Guaranty Trust Co.* v. *Missouri Pac. Ry. Co.*, 238 Fed. 812, 815, 816.

That he did so is proved in at least three ways: first, by the submission to him of the plan for his official judicial cognizance on the motions for confirmation; second, by his acts of confirmation; third, by his statements concerning the protest against confirmation and his opinion that: "These Committees and their counsel have had a difficult task. Considering all factors, they have, I believe, brought about a result that is as good as reasonably could have been expected . . ." (r. ex. 157a, ja 1799). The dissent has misapprehended the nature and meaning of Judge Knox's acts, including among others: his pressure for reorganization; the views he expressed concerning stockholder participation; his compromise of the interest rate on the new bonds to be issued for the old U. O. P. bonds; his confirmation of the sales prices, without consulting the receivers; and his approval of the plan as a whole (pp. 8-10, 15-17 above).

2. Actual Notice and Representation by the Indenture Trustee.

Petitioners' decedent, Cohen, had actual notice of the sales and of the hearings on confirmation (ff. 268, p. 775). Cohen's brokerage firm had published a prospectus on the U. O. P. bonds, and it was conceded that Cohen "knew the value of these bonds" and "had appraisals" (ja 1, 1844-8). Cohen procured information from the receivers (ja 125, 104). Cohen, despite actual notice, did not object to confirmation and did not appeal from the orders of confirmation.

The U. O. P. indenture trustee, who represented Cohen and *all* other bondholders whether or not they had deposited, considered the fairness of the bids, and petitioned for

and procured the order of confirmation. It did so without consulting or relying on Glass (pp. 15-16 above). The "trustee is himself the chosen representative of all, and whatever binds him *must bind them*". *Kersh Lake, etc.* v. *Johnson,* 309 U. S. 485, 491, 84 L. ed. 881, 885-6; *Kent* v. *Lake Superior, etc.,* 144 U. S. 75, 91, 36 L. ed. 353, 358; *Kerrison* v. *Stewart,* 93 U. S. 155, 162, 23 L. ed. 843, 846; *Fletcher* v. *Ann Arbor R. Co.,* 116 Fed. 479.

3. The Double Option.

The now superseded practice of reorganization in connection with foreclosure and judicial sales was sometimes subjected to the criticism that the right to deposit was cut off before the sale, thus confronting the would-be dissenter with the dilemma of depositing before the sale or taking his pro rata share in cash of a price he did not know and which might be less than the market value of the new securities which he would have received if he had assented to the plan. No such unfairness existed in this case. Here it was the few dissenters who received preferential treatment.

The right to deposit was open from August 1, 1929 through May 14, 1930, during which period it was *five* times extended (pa 2058). By virtue of the last extension it was kept open from December 16, 1929, the day when the sales prices became known, through May 14, 1930. During that period the market value of the new securities exchangeable under the plan for a $1000 U. P. O. bond having a distributive value of $698.55, went up to $1018.52 and was $956.40 on May 12, 1930, two days before the fifth and last extended closing date (ja 1791).

During that period the few dissenters had an option to elect to take the cash avails of the amounts bid at the sales, or another option to take the new securities under the plan and sell them in the open market for substantially

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more. The latter option "should be treated as the equivalent of money . . ." *Geddes* v. *Anaconda Copper Mining Co.*, 254 U. S. 590, 598, 65 L. ed. 425, 432; *Guaranty Trust Co.* v. *Seaboard Air Line Ry. Co.*, 60 F. Supp. 607, 616. Petitioners' decedent, Cohen, was both a depositor and a non-depositor of U. O. P. bonds and a depositor of other securities (ff. 260-7, p. 775). Cohen in his ambivalent position, and the few other non-depositors, received the preferential treatment of the *double option* to take their cash distributive shares of the sales prices, or to deposit their old securities and procure the new under the plan, or to sell the latter in the open market for cash in excess of the cash distributive values.

The statements in the dissent that the distributive values of undeposited U. O. P. bonds were not, or could not be, known until 1933, three years after the sales, is a misapprehension of fact (pa 2119). The distributive value of a $1,000 U. O. P. bond was *finally* fixed at $698.55 in 1933. But, the distributive value of the greater part thereof arising from the foreclosure sale of the Eureka stock was fixed by Judge Knox's order of confirmation on December 24, 1929 at $593.10 per $1,000 bond (ja 1743 at 1745). The relatively small residue of distributive value of a U. O. P. bond, arising from the sale of the unpledged assets, of course could not be *finally* fixed until the litigations on undetermined claims against those assets were decided by the special master and Judge Knox. However, it could easily be estimated. In December 1929 it was estimated within two dollars of the figure finally fixed by order of Judge Knox in 1933 when the litigations affecting "claims" against the unpledged assets were all determined (a. s. o. ex. 21, p. 239 following p. 1829a; cf. ja 1242). The estimate of the total distributive value as made in December 1929

was $696.90 per bond. The difference between it and the total amount finally fixed in 1933 was $1.65 per bond.

The attempted distinction of *Jameson* v. *Guaranty Trust Co.*, 20 F. 2d 808, 814 in the dissent is untenable. In *Jameson* there was a direct appeal by the objectant from the order of confirmation—a distinction which pervades every aspect of this case. In this case Cohen, with notice of the hearings on confirmation, failed to object and did not appeal from the order of confirmation. No case has been found in which a double option was granted by a court otherwise than upon a direct and timely appeal from an order confirming sale. Nor has any case been found in which the double option, when so granted, was extended for so long as the five months' period during which it was open in this case.

In *Thomas* v. *Central Hanover Bank, etc.*, 75 F. 2d (C.A. D.C.) 227, 232, on an objectant's timely appeal from an order confirming sale, it was granted for 90 days. In *Warner Bros. Pictures* v. *Lawton-Byrne-Bruner*, 79 F. 2d (8th Cir.) 804, 820, it was guardedly granted for 20 days. See also *Moss* v. *Geddes*, 28 N. Y. Misc. 291, 298-9; *Vatable et al.* v. *N.Y., L.E. & W. R.R. Co.*, 96 N. Y. 57; *Keane* v. *Moffly*, 66 Atl. 319, 320; Fletcher *Cyclopedia Corporations*, perm. ed. vol. 15, §7255, pp. 429-30; Cook *On Corporations*, 8th ed. vol. V, §888, p. 4138).

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POINT IV.

The findings of fact on values and the fairness of the sales prices for each parcel separately are supported by substantial evidence, are not clearly erroneous, and are binding under Rule 52. Relative misapprehensions in the dissent explained.

1. Receivers' Exhibits 201-2 and the Testimony on Values.

The matter of values and the fairness of the sales prices in respect of each parcel sold is covered by findings of fact 165-203, 217-20 in the opinion of the District Court (124 F. Supp. 728, 762-6, 767, cf. 788-90). They are based on the receiver's testimony and receivers' exhibits 201-2. Receivers' exhibits 201-2 are two large volumes 14″ by 9″, containing the valuation balance sheets of all thirty-nine companies as at December 31, 1929 and the court ordered petroleum engineer's [Ligon's] valuation of the oil properties, adjusted to that date. Petitioners have not submitted receivers' exhibits 201-2 to this Court though they contain the figure data from which the District Court's findings of fact on values were derived, and though they were carefully perused by the Court of Appeals as original exhibits. They were received in evidence at the trial without objection, after Glass' qualifications as an expert were established (ja 150-165 at ja 164). Cf. *Zimmerman* v. *Harding*, 227 U. S. 489, 496, 57 L. ed. 608, 611.

The following is a summary of receivers' exhibits 201-2, and of the extensive testimony, concerning values:

> 1. U. O. P., Imperial, M. S. O. and O. L. D. were insolvent.
>
> 2. The amount bid for the Eureka stock was 96.349% of its assets adjusted to the value of the

Turman stock on a capitalized earnings basis in which the amount of the earnings capitalized and the capitalization percentage were taken on clearly *maximum assumptions* leading to a higher valuation.

3. The amount so bid was 73.536% of Eureka's assets according to the petroleum engineer's [Ligon's] view of Turman's oil properties as such, adjusted to December 31, 1929.

4. The amount so bid was 95.367% of Eureka's assets adjusted to the *maximum* sales value of Turman's oil properties from the point of view of a practical oil operator.

5. The amount so bid was 103.583% of Eureka's assets adjusted to the *maximum* market value of the Turman stock as such.

6. The miscellaneous claims receivable, involved in an intercorporate maze and undetermined litigations which made time and amount of pay-out uncertain, as to which Judge Learned Hand stated a "purchaser would have merely bought into an incredibly complicated nest of law suits", were purchased at prices substantially higher than the 25¢ on the $1 of their distributive values which might have been paid by a rank speculator.

2. The Maximum Assumptions as to Earnings.

By December 1929 Turman had been in receivership for more than five years. Nevertheless, its net income was capitalized on the basis of *maximum favorable assumptions* for the future (ja 755-6, ja 185). The fortunate discovery of Turman's three Seminole leases yielded the greater part of Turman's income (ff. 32, 169-171, pp. 733, 763). These leases had been acquired at a cost of *only $80* (ja 755). To have capitalized the substantial earnings from that source as "reasonably" to be anticipated,

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i. e. that such earnings would again occur in the future at such nominal cost, was obviously a *maximum* assumption on the favorable side. There were other properties whose income was capitalized which came into Turman without any cost at all (ja 755-6). To have capitalized the income from that source as "reasonably" to be anticipated, *i. e.* that that could happen again in the future, was obviously a *maximum favorable assumption.* These maximum assumptions far outweighed such non-recurrent costs, if any, of receivership as might have been involved in capitalizing Turman's income for the period in question (ja 755-6; pa 2040-1). The dissent overlooked the testimony as to these *maximum* assumptions leading to higher valuation, which forms the basis of the findings of fact made by the District Court who heard that testimony and perceived its sense and implications.

3. The Maximum Assumption as to Capitalization Factor.

Similarly the dissent overlooked the fact that the 10% capitalization factor was also a *maximum favorable assumption* (ja 185, pa 2039-40). Receivers' exhibit 149 shows the percentage at which the market capitalized the earnings in 1929 of stocks of nine comparable oil companies (ja 1792, ja 183). One of them was Lion Oil Refining Co., a potential purchaser (pp. 10-11 above). The market capitalized its earnings at 24.38% (r. ex. 149, ja 1792). The market capitalized the earnings of the nine oil companies in a range of 15% to 24.38%, with an average at 19.31%. Obviously, a higher capitalization percentage, resulting in a lower valuation, was justified on the basis of the market capitalization of the earnings of the nine oil companies generally comparable to Turman, but then more favorably situated than was Turman which did not emerge from receivership until eleven months after the sale (r. ex. 285, ja 1984,

item 35). Hence the majority of the Court of Appeals used a higher capitalization percentage and, even on a four year basis of the most favorable earnings, stated: "On the whole our guess is that it"—the $1,450,000 bid for the Eureka stock—"bordered *on the high side*" (pa 2041).

4. Further Misapprehensions in the Dissent Concerning Values and Valuation.

The base period for measurement of the "*reasonably*" to be anticipated income to be capitalized for the future was the five year period 1925-9 (ff. 169, p. 763, pa 2040-1). The dissent, in a series of misapprehensions of the *maximum assumptions* as to income described above, presents a four and three year base period (pa 2096-9). In doing so, the dissent glosses the majority opinion of Judge Learned Hand and states: "My colleagues, after some discussion, *conclude* that the proper years are not 1924-1929, but the *four* years, 1925-1929" (pa 2096). The majority opinion on the point is at pa 2040. It says merely that "*if* it be thought unfair to include it [the year 1925] "certainly it would be *permissible* to take the four years 1926-1929 inclusive" (pa 2040). The majority did not "admit" that allegedly "non-recurrent" receivership expenses would have to be deducted. They said: "Some of the items deducted appear to be such that they would have had, at least in part, some equivalents if the Eureka [and Turman] company had not been in receivership; from the face of the [objectants'] exhibit it is impossible to say that under another name they might not have been a usual corporate expense" (pa 2040). The misapprehension in the dissent which attributes to the majority the adoption of "the four years 1925-1929" as the base period is arithmetical also. The period 1925-1929 is five, not four, years. The use by the Court of Appeals of a four year base income

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period was an additional justification of the findings of fact below, as to values, not a rejection of them.

The dissent states that: "Glass and the committee chose, as the sales price, 66⅔% of what they estimated as the 'going concern value' of *each* of the properties" (pa 2089). That is a misapprehension of findings of fact 165 and 202 (124 F. Supp. 728, 762, 766). The two-thirds figure was *not* "of *each* of the properties", but of *all* of the properties *including* those substantial parts thereof which were acquired from parties outside the sales. Findings of fact 165 and 202 show that the District Court *included* in the two-thirds figure the "assets to be *contributed* under the plan by the Westervelt Committee" (ff. 165) acquired "otherwise" than "by the sales" (ff. 202). Among them was "the Gulf Coast claim" (ff. 227, 237, pp. 768-9). The Gulf Coast claim was allowed for more than $1,654,000 against both M. S. O. and Southern States Oil Corporation (ff. 126-129, pp. 759-60). It was shown by receivers' exhibit 201 to have a total cash distributive value of $1,104,778.28. The other assets that came into the new company outside the sales also had substantial values.

The dissent quotes in part a letter by the receiver Glass, dated April 28, 1941, almost 10½ years *after* the sales, in in which he referred to a 10% capitalization factor in an argument concerning valuation of M. S. P. (pa. 2097). The dissent does not quote the following parts of that letter: "I believe, however, that under *present* conditions, and considering *present* yields on investments, properties . . . are entitled to be valued at at least that figure" (1786a). It is respectfully submitted that the "*present* conditions" and the "*present* yields on investments" in the year 1941 were not comparable with the "conditions" and "yields" at the time of the sales in December 1929.

5. The Valuations of the Eureka Stock.

Said stock was valued on four different bases, each of which was adopted by the District Court (ff. 165-202, pp. 762-6, 790). The first was capitalization of earnings (ff. 169, 171, 176-7, pp. 763-4). Even on the above described maximum assumptions as to quantum of reasonably capitalizable earnings and capitalization factor of Turman, the stock of Eureka, which owned 82% of Turman, had a value of $1,504,938.78 (ff. 171, p. 763). The bid therefor was $1,450,000 (ff. 177, p. 764). That was a discount of only 3.6+% from 100% of such valuation.

No reasonable businessman would have bought the Eureka stock except at a discount from 100% of such valuation on maximum assumptions. The discount would have had to be substantial to compensate him for risk of loss in the hazardous business of an oil producing company, and to yield a profit on his substantial cash investment. Manifestly, the discount would have had to be very much greater than the discount of 3.6+% at which the stock was bought by the reorganization committee. The bid was fair (ff. 177, p. 764).

The second basis was the value of the Turman stock as such. The District Court found that in December 1929 "$4 per share was a fair market price for Turman stock" (ff. 168, p. 763). On that basis, Eureka's net worth was $1,399,841.27 (ff. 170, p. 763). The $1,450,000 bid was 103.583% of Eureka's net worth on that basis. Obviously it was fair.

In fact, $4 per share was a *maximum* assumption. Turman's 1929 earnings were 67¢ per share (ja 183). Four dollars per share for its stock was slightly less than six times those earnings (ja 183). The stocks of the nine other

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generally comparable oil companies shown on receivers' exhibit 149 sold in 1929 at an average of 5.18 times earnings (ja 183-5, 1792). The stock of Lion Oil Refining Co., the potential purchaser, sold at 4.1 times earnings (ja 1792).

The sale took place on December 16, 1929, shortly after the stock market crash of October 1929. The value of the Eureka stock was also adversely affected by Eureka's deficit of $179,382.29 in current assets to meet its current liabilities (ja 197-8). It was also adversely affected by the fact that Turman was in receivership in the primary jurisdiction at the time of sale and did not emerge therefrom until eleven months later (ja 1984). Obviously the $4 per share figure adopted by the District Court as "a fair market price" was a maximum price at the time.

The third basis was the court-ordered petroleum engineer's [Ligon's] valuation, adjusted to December 31, 1929 (ff. 175, p. 764; cf. p. 790). The engineering method was Ligon's, not the receiver's. The $1,450,000 bid for the Eureka stock was 73.536% of $1,971,814.58 which was the resultant of that valuation (ff. 175, p. 764).

The resultant of that engineering approach is not to be confused "with fair market value". Petitioners stipulated to be bound by Paine's "Oil Property Valuation", published August 1942 (ja 1061). To arrive at "fair market value" of a producing oil property Paine applied a discount ranging from 60% to 30% of the engineer's result (ja 1104-5). The discount of the $1,450,000 bid for the Eureka stock from the valuation via the Ligon adjusted appraisal was only 26.464%, despite the fact that Eureka had a deficit of $179,382.29 in current assets to meet its current liabilities. Obviously it was fair.

The fourth basis was the practical oil operator's point of view of 40¢ per barrel of oil in the ground, 50¢ on the dollar of the sale value of the residuum of undeveloped acreage which Ligon had valued, and the cost of undeveloped acreage acquired subsequent to the date of the Ligon valuation. Involved were a series of *maximum* assumptions favorable to increasing the amount of the valuation (ja 172-81, 1082-6, 1171-81, 1196-8, 1201-4, 1222-6, 2110-21).

The practical oil operator's valuation of Eureka's assets, including its interest in the Turman stock, was $1,520,435.93 (ff. 173-4, pp. 763-4). On that basis the bid of $1,450,000 involved a discount of only 4.633%. It was remarkably close to valuation on the criterion of capitalization of earnings. Obviously it was fair (ff. 177, p. 764).

Reference is made to the last paragraph of footnote 41 of the dissent where it is indicated that the future earnings of undeveloped acreage on hand December 31, 1929 "should probably be added to the capitalized earnings" (pa 2098). The conceptual basis of valuation by capitalization of earnings does not include ascribing earnings to undeveloped acreage which have no earnings to be capitalized. The valuation of undeveloped acreage belongs to the method of the petroleum engineer. Following that method, the 50¢ on the $1 appraisal of the residuum of the Ligon valued undeveloped acreage owned by Turman on December 31, 1929 was, on *maximum* assumptions in 1929, $163,000 (ja 1181). The amount actually realized from that undeveloped acreage during the ensuing years, discounted to its value as at December 31, 1929, was, *before* deductions for overhead charges, $48,747.12 (ja 1172-3; r. exs. 406-7, ja 2110-23). Obviously the residuum of undeveloped acreage was overvalued.

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6. The Receivers Discharged any Burden of Proof.

Value is a question of fact. *Trinity Building Corp.* v. *O'Connell,* 2d Cir., 155 F. 2d 327, 329. The findings of fact and opinion of District Judge Smith evoked the admiration of the Court of Appeals (pa 2140; pa 2021-6). In *Graver Tank & Mfg. Co.* v. *Linde Air Prod. Co.,* 336 U. S. 271, 275, 93 L. ed. 672, 677, this Court held:

> "... A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error ...
>
> "No such showing is made."

Here, too, the Court of Appeals found that the evidence warranted the conclusion that the bid was fair even on grounds not found by the trial court (cf. pa 2040-1). The Court of Appeals noted that the "trial judge adopted four possible approaches" in his findings of fact as to values and fairness (pa 2038). It concerned itself with only two of them. However, there can be no doubt that the valuation on the basis of the court-ordered petroleum engineer's appraisal, adjusted to the pertinent date, and the valuation from the point of view of a practical oil operator, were entitled to and carried great weight with the trial judge. They confirmed the findings of fact made on the primary criteria of capitalization of earnings and stock market values, and made overwhelming the weight of the evidence on at least those two, if not all four, of the valuation bases. The trial court held (124 F. Supp. 728, 790):

> "... On trial of the objections, the receivers *established also* that the bids, *taken individually,* were fair on such sales, having in mind the Ligon

valuations of the physical assets and the nature of the so-called mongrel assets. . . .

"... The amounts bid were fair bid prices."

The bids for the intercompany accounts called the miscellaneous claims receivable, involved in an extraordinary maze of 39 corporations with criss-crossing claims receivable and payable and intercompany stockholdings and further involved in undetermined litigations which made time and amount of pay-out uncertain, were found to be fair by the two courts below (ff. 10-22, pp. 731-732; ff. 91-131, pp. 739-60; ff. 184-192, pp. 764-5). District Judge Smith stated that: "There is no reason, however, to doubt Glass' testimony that the value which he now believes he considered should be placed on the mongrel assets, including the claims in the 'merry-go-round', for reorganization purposes, was considerably higher than any outside interests could safely, or would, with any degree of probability, have bid" (p. 788). The majority opinion of Judge Learned Hand states that the findings of fact of District Judge Smith on the subject of that "incredibly complicated nest of law suits", and his approval as fair of the prices paid for them, were not "clearly erroneous" (pa 2045).

The dissent argues against the pertinent findings of fact in terms of the face amount of one of the large claims involved, with an implication that somehow their face amounts might have been realized (pa 2111, 2117-18). The dissent overlooks the credible testimony that the appraisal of these complicated claims was made on the basis of *maximum* assumptions as to the assets and *minimum* assumptions as to the liabilities of the maze of corpotions involved (ja 154; ja 202-4). For instance, in calculating the value of the $1,370,000 receivable by U. O. P. from M. S. O., $7,486,103.31 of M. S. O.'s liabilities, pending *unadjudicated* at the time of the sales and not deter-

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mined until two or three years later, were eliminated in calculating liabilities on minimum assumptions (ja 222-8). Unfortunately petitioners have not submitted to this Court receivers' exhibit 201 containing the valuation balance sheets of all the corporations, including M. S. O., which shows the detail of that elimination and of the millions of dollars of claims which remained to be paid. The implication in the dissent that these claims might have been worth their *face* amount, is expressly negated by findings of fact 217-20 at page 767.

It is clear that in respect of each parcel of the properties sold the receivers discharged any burden of proof which lay upon them concerning its value and the fairness of the prices paid for it. Their maximum assumptions of assets and minimum assumptions of liabilities are reflected in every valuation figure adopted or approved by the two courts below.

POINT V.

The findings of fact concerning Judge Knox's knowledge and acts in respect of Glass' alleged frauds upon him are supported by substantial evidence, are not clearly erroneous, and are binding under Rule 52. Relative misapprehensions in the dissent explained.

1. The Hamburg and Cunningham Matters.

These matters are also fully covered by specific findings of fact (ff. 1-9, 84-85, pp. 730-1, 736; see also p. 778). Those findings are supported by substantial evidence, most of it written (r. exs. 153A-C, 1427a-9a; Judge Knox at 1413a; r. ex. 159, ja 1810-11; ja 379; 671a-3a; 1233a-7a; ja 1181-2).

That evidence shows that two matters were involved: (1) the participation of the firm of Olcott, Olcott & Glass

in the Hamburg fees (ff. 85, p. 736; see also p. 778); and (2) the Olcott firm's participation in the fees of the Cunningham firm which succeeded the Olcott firm as attorneys for the stockholders committee organized by Shivers (f. 84, p. 736). The crux of these matters was whether Judge Knox was informed of them. In *Weil* v. *Neary,* 278 U. S. 160, 168, 73 L. ed. 243, 248, this Court held:

> "... Had there been evidence that the court had such knowledge, certainly the referee would have found it. The point was *crucial* ..."

See also *Connelly* v. *Hancock, Dorr, et al.,* 2d Cir., 195 F. 2d 864, 868; *Cromwell* v. *Curtis,* 2d Cir., 99 F. 2d, 810, 812.

Judge Knox had such knowledge. August 25, 1926, more than three years before confirmation of the sales, Glass informed Judge Knox concerning the Olcott firm's interest in the Hamburg fees (r. ex. 153A, 1427a). The announcement speaks for itself. Judge Knox retained it for consideration every time he acted on allowances to Hamburg (124 F. Supp. 728, 778). As appears more fully below in the chronological account of these matters, the dissent misapprehended the occasion and purpose of Glass' *second* announcement to Judge Knox concerning the Hamburg matter.

The second matter arose from the changes in status of the Olcott firm and Glass. They were: the change in status, with the knowledge and upon the appointment of Judge Knox, of the Olcott firm from that of attorneys for the stockholders committee to that of co-attorneys for the receivers Mayer and Tumulty (ja 1248); their subsequent resignation as such when Glass was appointed co-receiver, leaving his firm with no status in the case except the right to be paid for the services they had rendered in their successive prior positions; and the concurrent change in status,

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with the knowledge and upon the appointment of Judge Knox, of Glass from that of a junior partner in the Olcott firm to that of co-receiver (115a).

When the Olcott firm was succeeded by the Cunningham firm as attorneys for the stockholders committee, no arrangement was made to divide fees upon that first change of status (1233a-8a). This was confirmed by petitioners' witness, John H. Jackson, a member of the Cunningham firm, who testified that his firm proposed the arrangement years later (ja 379; pa 2030). At the last reorganization hearing on December 23, 1929, *before* confirmation of the sales, Judge Knox requested in the presence of all the parties that he be furnished with information concerning the "reorganization expenses", *i.e.*, the fees and expenses of the committees, as distinguished from allowances in the cause then being argued. The parties informed Judge Knox that no thought had been given and no action taken on that matter up to that time (1412a). Judge Knox:

> "I will be glad to have some general idea as to what these costs are going to because I wish to have some idea as to what is ultimately going into this new corporation, *and I think that the whole relationship of one set of officials to the other is so intimate that the two will bear some connection*" (1413a).

And:

> "*I desire to have that information*" (1415a).

Within a week Judge Knox was given that information which, at the trial, was also taken out of Judge Knox's own file (ja 117-8; 1431a-7a).

Shortly before January 15, 1930 and while Judge Knox was considering the information thus made available to him, Glass learned from his senior partner Olcott, who then had

no status in the case other than his right to be paid for services previously rendered by his firm, that it was proposed to divide the fee to be paid to the Cunningham firm in lieu of separate fixation of fees for the services successively rendered by the Olcott firm and the Cunningham firm as attorneys for the stockholders committee. January 15, 1930, Glass wrote to Judge Knox requesting a conference, and, at the conference held shortly thereafter, informed Judge Knox of those facts, and that Lind, a member of the receivership staff, merited the compensation proposed to be paid to him by the reorganization committee for overtime accounting services rendered to it (r. ex. 153B, 1427a; 671a-3a).

February 4, 1930, in his first Hamburg opinion, Judge Knox stated that the committees' fees and expenses "appear to me as excessive" (r. ex. 425, ja 2145). Thereafter Judge Knox met with representatives of the reorganization committee, discussed the reorganization fees and expenses "both past and prospective" and rewrote the latter part of the Hamburg opinion (r. ex. 159, ja 1810-11; r. ex. 157A, ja 1798-1800; cf. the first Hamburg opinion, r. ex. 425, ja 2145).

February 4, 1930, Glass *again* brought to the attention of Judge Knox the Olcott firm's participation in the Hamburg fee, to obviate Hamburg's attempt to procure *premature* payment *in full* of the *very fee* in which Judge Knox had *previously* been informed that the Olcott firm had an interest (r. ex. 153C, 1428a-9a; r. ex. 153A, 1427a). This announcement also speaks for itself.

No court rule or statute covered these matters in 1930. As shown by *Weil* v. *Neary, supra,* the court's knowledge was the "crucial" factor. Fraud is a question of fact. This Court has held: ". . . it is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which

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the District Court apparently deemed innocent." *United States* v. *National Association R. E. B.*, 339 U. S. 485, 495, 94 L. ed. 1007, 1016.

2. Relative Misapprehensions in the Dissent.

The dissent misapprehends the intent and function of Glass' second accouncement to Judge Knox concerning the Hamburg matter, and fails to perceive the ethical quality of it (pa 2074). There can be no inference that Judge Knox had to be reminded of the first announcement which he carefully retained in his file for reference. The intent and function of the second announcement was to obviate Hamburg's attempt to foil Glass' recommendation to Judge Knox that 25% of all allowances, including his own and Hamburg's, be retained until further order of Judge Knox.

The dissent does not contend that Judge Knox was not fully informed concerning both of these matters. It proceeds on the misapprehension that Judge Knox did not know of them "*before* confirmation of the sales" on December 24, 1929 (pa 2074; pa 2070). As to the Hamburg matter, it is a mistake; as to the Olcott matter, it overlooks the fact that Judge Knox called for the information on December 23, 1929, *before* confirmation, and did not determine his allowances until he had the information. February 18, 1930, when he concededly knew of both matters, Judge Knox wrote a highly laudatory opinion concerning Glass' services and awarded him as successor receiver, and the Olcott firm as former co-attorneys for the receivers Mayer and Tumulty, separate substantial compensation (ja 1808-9).

3. Concerning Becoming Counsel.

More than two years before the 1929 sales and reorganization Glass informed the ancillary receiver that "I do

not care to continue with the reorganized company in any executive capacity'' and the ''only relationship on my part with the company in the future that will be *possible,* as far as I am concerned, will be a professional relationship, *if* my legal services should at any time *be required''* (r. ex. 38A, 1283a). There is no finding that Glass did in fact become counsel to the new company, M. S. P., which was created two years later. The finding of fact is that he became its president with the permission of Judge Knox, a position he did not want, ''although he *hoped* to continue to be associated in a legal capacity with the new corporation'' (ff. 50-1, p. 734). Both courts below agreed unanimously that there was no liability for becoming president. The dissent is that Glass had more than a ''hope'' of becoming *counsel*—though it is not contended he became such—and did not disclose ''this interest'' to Judge Knox with whose permission he became president (pa 2075-6).

The dissent states: ''My colleagues, however, concede that, long before the judicial sales, Glass had 'quite frankly declared' that he would *like* to be 'lawyer for the reorganized company' '' (pa 2075). We are unable to find that concession in the majority opinion (pa 2024, 2031-6), or to trace the source of the above matter quoted in the dissent.

It would be vain to attempt to gloss the majority opinion of Judge Learned Hand on this subject (pa 2024, 2031-6). A ''hope'' is not an ''interest'' to be disclosed to a judge as a conflict, especially when it does not become a reality. More than that, Glass never expressed even a ''hope''. His letter refers to a mere *possibility. Cf. United States* v. *National Assn. R. E. B.,* 339 U. S. 485, 495, 94 L. ed. 1007, 1016. It remains but to add that Glass discharged any burden incumbent on him of proving that no one suffered any damage from the alleged conflict ascribed to said expression of a mere possibility (pp. 33-35 above).

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POINT VI.

The receivers may not, absent fraud on the court, be surcharged for obedience to Judge Knox's orders even assuming error therein, nor for alleged violation of the Boyd rule arising from their obedience to his orders. The findings of fact concerning the reorganization plan are supported by substantial evidence, are not clearly erroneous, and are binding under Rule 52. Relative misapprehensions in the dissent explained.

The reorganization plan and the Boyd rule are covered by findings of fact 27, 34, 217-59 of the findings of the District Court (124 F. Supp. 728, 732-3, 767-74); see also pp. 799-80 of its opinion and pa 2054-9 of the opinion of the Court of Appeals.

1. The Protection of Court Orders and Instructions.

Assuming without conceding that some error of fact, law or discretion could now be discovered in the orders, decrees and procedures made and adopted by Judge Knox twenty-five years ago, receivers' wrongdoing cannot be predicated on the mere discovery of such error. To infer that such error *must* have been caused by a fraud committed on Judge Knox by the receivers, or that it could not have happened without such fraud, is to assume the fact which must be proved. This the law will never do. *Pennsylvania R. Co.* v. *Chamberlain*, 288 U. S. 333, 339-41, 77 L. ed. 819, 823. Nor can any inferences be drawn inconsistent with Judge Knox's knowledge and intelligent comprehension of the case and the orders, decrees, and procedures he made and adopted in it decades ago.

The receivers of U. O. P. did not receive any tangible property. Putting aside immaterial matters, their account-

ing shows *obedience* to Judge Knox's order foreclosing the equity of redemption in the Eureka stock pledged to, in the name of, and held by, the U. O. P. indenture trustee; and obedience to Judge Knox's order to sell the three unpledged accounts receivables of U. O. P. (ja 1238-9). The former arose from Judge Knox's final decree and order confirming sale in the U. O. P. foreclosure action; the latter from Judge Knox's order of *instructions* in this cause. Absent fraud upon the court—and here there was none—a receiver is not to be surcharged for obedience to the orders or instructions of the court.

In the *Boyd* case it was held that, despite the transferee's liability, the decrees of sale as such "were free from any moral or actual fraud". *Northern Pacific R. Co.* v. *Boyd*, 228 U. S. 482, 502, 57 L. ed. 931, 941. Accordingly, assuming *arguendo* some violation of the *Boyd* rule arose twenty-five years ago from Judge Knox's decrees and his special master's deeds of sale, petitioners' recourse, if any, must like Boyd's, be against someone other than the receivers. The protection to a receiver or other stakeholder of the court's decrees of sale or distribution has long been established. *Williams* v. *Gibbs*, 17 How. 239, 256-7, 15 L. ed. 135, 141; *Ex Parte Howard*, 9 Wall. 175, 185-6, 19 L. ed. 634, 637.

2. Relative Misapprehensions in the Dissent, Especially Those Concerning "System" Reorganization.

The dissent (pa 2069): "Here I note that never did the judge press for a 'system' reorganization . .". Judge Knox (1338a): "The creditors *and stockholders* have got to get something out of this, if *I* can see to it in any way, shape or form . . ." (1338a; see also p. 9 above). Judge Knox persuaded the U. O. P. bondholders' committee to accept, instead of a 7% interest rate, 6% upon the new

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bonds after the committee "had fought again to the limits of its rights to object" (r. ex. 90, ja 1556-8; r. ex. 89, not printed in the appendices, but see ja 78-80 and pp. 9-10 above).

The dissent, referring to U. O. P. (pa 2114): "Surely when insolvent Company A could be reorganized by itself, and so reorganized, *could easily obtain all needed additional funds . . .*". U. O. P. had not a dollar of current assets (p. 11 above). Eureka, whose stock it had pledged, had a *deficit* of $179,382.29 in current assets to meet its current liabilities (ja 197-8; p. 31 above). Turman, only 82% of whose stock was owned by Eureka, could not and did not get out of receivership until eleven months after the 1929 sales (ja 1984; p. 27 above). In the reorganization plan, the U. O. P. bondholders' committee stated: "* * * In recognition, however, of the possibility that if the Bondholders were forced to foreclose and make *separate disposition* of the assets securing their Bonds they would *not* realize the amount unpaid on their Bonds for principal and interest, the Plan requires them to accept a reduction in the interest rate from 8% to 6½% and to take A Stock for the interest on their Bonds to July 1, 1929" (ja 1581).

Without the assets that came into the new company from the corporations other than U. O. P. and from sources outside the sales, reorganization would not have been feasible. The U. O. P. bondholders received the substantial equitable equivalent of their old bonds in new bonds which were paid in full and in A stock which became of great value. These were secured and supported not only by the assets which had secured their old bonds, but also by very valuable assets contributed by other parties (ff. 217-259, pp. 767-74; see also pp. 799-80; pa 2054-2059). There is no Boyd rule question in the case in respect of the U. O. P. bonds (124 F. Supp. 728, 799).

The dissent states, in relation to the Boyd rule, that Glass had the burden of proving the "fair going-concern value" not only of the Eureka stock, but also of the unpledged assets, and selects as an example U. O. P.'s receivable from M. S. O. (pa 2117-18). It further states: "• • • it was up to him to prove that it was not worth at least $1,730,000" (pa 2118). The face amount was not that figure; it was $1,371,002.93; the order of December 14, 1929 did not "liquidate" it at that or any other figure; it merely approved the receivers' staff's reconstruction of that and all the other intercompany accounts out of the chaos and absence of record created by Haskell (ff. 91 at p. 742; ff. 92 at p. 748). The findings of fact are clear that Glass discharged any burden of proof concerning the value of that receivable from M. S. O., assuming *arguendo* he had any such burden (ff. 217-20, p. 767; see also p. 788; pp. 33-35 above). So, too, in respect of the Eureka stock (ff. 202, 766; see also pp. 30-32, above).

Conclusion.

The judgment of the Court below is correct. No sufficient reason has been advanced for its review by this Court. The petition for a writ of certiorari in respect of the respondents named below should therefore be denied.

Dated, April 25, 1955.

Respectfully submitted,

Leslie Kirsch and Joseph P. Tumulty, Jr.,
Counsel for the Respondents, Bessie G. Glass, Executrix of the Estate of Joseph Glass, and Joseph P. Tumulty, Jr., Executor of the Estate of Joseph P. Tumulty.

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APPENDIX.

Judgment Dismissing as to Glass Petitioners' Appeal from the First Judgment* of the District Court.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 25th day of March one thousand nine hundred and fifty-four.

Present:

Hon. LEARNED HAND,
Hon. THOMAS W. SWAN,
Hon. JEROME N. FRANK,
Circuit Judges.

JOSEPH A. PHELAN,
Complainant,

v.

MIDDLE STATES OIL CORPORATION, *et al.*,
Defendant,

MEYER KRAUSHAAR and *ano.*,
Objectants-Appellants-Appellees,

JOSEPH GLASS and *ano.*,
Appellees,

MIDDLE STATES PETROLEUM CORP.,
Appellant.

Appeal from the United States District Court for the SOUTHERN DISTRICT OF NEW YORK.

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* The first judgment of the District Court appears at pp. 9a-13a of appellants' appendix in the Court of Appeals.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the objectants' appeal from the judgment of said District Court in so far as it relates to Glass be and it hereby is dismissed; and so much of the judgment of said District Court as dismissed the cross-claim of Middle-States Petroleum against the executors of William W. Cohen, deceased, be and it hereby is reversed and the cause be and it hereby is remanded for further proceedings in accordance with the opinion of this Court of January 15, 1954 as amended and in accordance with the opinion of this Court of February 8, 1954.

It is further ordered, in accordance with the opinion of this Court, that in all other respects the appeal be and it hereby is continued for further hearing upon the record now on file and such supplemental record of further proceedings, if any, in the District Court as may hereafter be filed.

It is further ordered that costs on the cross-appellant's appeal be and they hereby are awarded to the cross-claimants in accordance with the opinion of this Court of February 8, 1954 taxed at the sum of $1,056.59.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

/s/ A. DANIEL FUSARO,
Clerk.

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Second Judgment of the District Court.

(Entered May 21, 1954.)

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOSEPH A. PHELAN, Complainant, *against* MIDDLE STATES OIL CORPORATION, *et al.*, Defendants.	In Equity No. E 30-104 Decree.

This cause having further come on to be heard under Rule 23(c) of the Rules of Civil Procedure for the District Courts of the United States, it is hereby

ORDERED, ADJUDGED AND DECREED that:

I. The Judgment herein dated January 4, 1952 is modified so as to add to paragraph 4 thereof the name of Joseph Glass as a Receiver of United Oil Producers Corporation and to delete paragraphs 5 and 9 thereof.

II. All matter containing any reservation concerning the discharge of Joseph Glass, as a Receiver of United Oil Producers Corporation, in the findings of fact, conclusions of law, and memorandum of opinion, relating to said judgment, is deleted.

Dated, May 21, 1954.

J. JOSEPH SMITH,
United States District Judge.

Petitioners' Notice of Appeal from the Second Judgment* of the District Court.

(Filed U. S. D. C., S. D. N. Y., June 9, 1954.)

DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF NEW YORK

JOSEPH A. PHELAN,
Complainant,

against

MIDDLE STATES OIL CORPORATION, *et al.*,
Defendants.

In Equity
No. E 30-104

Sirs:

PLEASE TAKE NOTICE that Meyer Kraushaar and Sophie D. Cohen, sole surviving executors of the Estate of William W. Cohen, deceased, owners or holders of $32,200 par value of United Oil Producers Corporation bonds, on behalf of themselves and all other bondholders similarly situated, also as owners or holders of 2831 shares of Southern States Oil Corporation, on behalf of themselves and all other shareholders similarly situated, Sophie D. Cohen, owner of 286.21 shares of Oil Lease Development Corporation, on behalf of herself and all other shareholders of said corporation similarly situated, Levy Bros., a partnership, owners of 9,065 shares of Southern States Oil Corporation, and Sophie D.

* The judgment of affirmance by the Court of Appeals of said second judgment appears at pa 2208.

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Cohen, owner of 8206.22 shares of Southern States Oil Corporation, on behalf of themselves and all other shareholders similarly situated, Sophie D. Cohen, as owner or holder of 2200 shares of Western States Oil Corporation, on behalf of herself and all other stockholders similarly situated, and Sophie D. Cohen and Meyer Kraushaar, as sole surviving executors of the Estate of William W. Cohen, deceased, owners of 11,833 shares of Gulf States Oil & Refining Corporation, on behalf of themselves and all other stockholders similarly situated, all the aforesaid persons being objectants to the account of the Receivers herein as Receivers of United Oil Producers Corporation, hereby appeal to the Court of Appeals of the United States, Second Circuit, from the final judgment or decree dated May 21, 1954, and filed in the office of the Clerk of the United States District Court for the Southern District of New York on said May 21, 1954, which said judgment or decree modifies the judgment herein dated January 4, 1952, by adding to paragraph 4 thereof the name of Joseph Glass, as Receiver of the United Oil Producers Corporation, and deletes paragraphs 5 and 9 thereof, and which said judgment or decree further deletes from the aforesaid judgment any reservations concerning the discharge of Joseph Glass, as Receiver of United Oil Producers Corporation and any reservation contained in the findings of fact, conclusions of law and memorandum of opinion, and said objectants hereby appeal

from the whole and each and every part of said judgment or decree.

Dated: June 8, 1954.

Yours, etc.

KRAUSHAAR & KRAUSHAAR,

By MEYER KRAUSHAAR,
Attorneys for Objectants,
Office & P. O. Address,
42 Broadway,
Borough of Manhattan,
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To:

CLERK, UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

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